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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

PARNELL COLVIN,  
Plaintiff,

Case No. 2:20-cv-01765-APG-EJY

v.

**PLAINTIFF'S REPLY IN SUPPORT OF  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT ON LIABILITY**

M.J. DEAN CONSTRUCTION, INC.,  
Defendant,

*Oral Argument Requested*

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

Defendant M.J. Dean's ("MJ Dean") opposition to Plaintiff's Motion for Partial Summary Judgment ("Plaintiff's PMSJ") does not provide this Court with any facts to create a genuine issue of material fact regarding the instant motion for liability on Plaintiff Parnell Colvin's ("Colvin") claims of (1) Negligent Training and Supervision, and (2) Retaliation in violation of Title VII. MJ Dean ignores the facts that establish liability on these claims showing there is no genuine issue of material fact to allow this Court to find liability against MJ Dean. MJ Dean connived racial discrimination in violation of Title VII by not properly training its management to prevent discrimination and failing to enforce its anti-discrimination policies. MJ provides no explanation why it would ever allow Gutierrez (who called Colvin a "nigger") to terminate Colvin's employment. MJ Dean's failure to enforce its anti-discrimination and harassment policies, as well as its termination policy, shows that MJ Dean tolerates racial discrimination and allows pervasive racial discrimination to continue to occur in its workplace.

1 **II. STATEMENT OF UNDISPUTED FACTS**

2 In its Opposition to Plaintiff's PMSJ, MJ Dean does not dispute the following facts:

- 3 1. Racist graffiti has appeared in the bathrooms at the Sphere project 200 different  
4 times. (*See* Exhibit 11, at 33:8-18.)
- 5 2. Racism at the Sphere project is an ongoing issue. (*See* Exhibit 11, at 33:15-18.)
- 6 3. Gutierrez reported the 200 instances of racist bathroom graffiti he saw at work to  
7 Safety. (*See* Exhibit 11, at 31:22 to 32:1.)
- 8 4. Gutierrez never reported the white supremacist comments he heard at work. (*See*  
9 Exhibit 11, at 40:21-25, 41:8-10, & 41:19 to 42:2.)
- 10 5. Gutierrez admits he is supposed to report racial slurs and racist graffiti to  
11 Rosequist in Safety. (*See* Exhibit 11, at 22:15-25, 23:11-17, & 42:11-16.)
- 12 6. Gutierrez was initially Colvin's supervisor. (*See* Exhibit 3; and *see* Exhibit 10, at  
13 89:2-4.)
- 14 7. Gutierrez is MJ Dean's General Foreman. (*See* Exhibit 11, at 7:1-3.)
- 15 8. Thomason never conducted meetings or trainings regarding MJ Dean's anti-  
16 discrimination and harassment policies. (*See* Exhibit 12, at 25:9-17.)
- 17 9. Thomason does not know whether any meetings or trainings occurred following  
18 Colvin's complaints regarding the racially hostile work environment. (*See* Exhibit  
19 12, at 25:18-21.)
- 20 10. Rosequist never conducted meetings or trainings regarding MJ Dean's anti-  
21 discrimination and harassment policies. (*See* Exhibit 13, at 18:12-16 & 19:5-18.)
- 22 11. While Rosequist decides what information is discussed at weekly safety meetings,  
23 he does not know if he had the anti-discrimination and harassment policies  
24 discussed. (*See* Exhibit 13, at 18:12-16 & 19:5-18.)
- 25 12. Rosequist does not attend weekly safety meetings. (*See* Exhibit 13, at 18:12-16.)
- 26 13. MJ Dean did not discuss the anti-discrimination and harassment policies at the  
27 weekly safety meetings following Colvin's complaints. (*See* Exhibit 12, at 25:18-  
28 21; and *see* Exhibit 13, at 19:5-18.)

- 1           14.     Rosequist never submitted Colvin's complaint regarding Gutierrez calling him a
- 2                 "nigger" to Human Resources. (*See* Exhibit 13, at 17:23-25.)
- 3           15.     Neither Tony nor Julian from Safety reported the numerous instances of racist
- 4                 bathroom graffiti to Rosequist. (*See* Exhibit 13, at 15:10-15, 16:10 to 17:3, &
- 5                 20:10-13.)
- 6           16.     MJ Dean tolerates racism in its workplace. (*See* Exhibit 12, at 25:18-21; and *see*
- 7                 Exhibit 13, at 17:23-25, 18:12-20, & 19:5-18.)
- 8           17.     MJ Dean did not follow its termination policy when it had Gutierrez terminate
- 9                 Colvin, instead of Muti, Colvin's supervisor. (*See* Exhibit 4, at APP013.)
- 10          18.     MJ Dean did not follow its termination policy when it allowed Gutierrez to
- 11                 terminate Colvin without providing him his final check. (*See* Exhibit 4, at
- 12                 APP013.)
- 13          19.     MJ Dean directed Colvin be terminated by Gutierrez who called Colvin a
- 14                 "NIGGER" five months earlier. (*See* Exhibit 12, at 36:17-19.)
- 15          20.     Colvin was terminated three months after he complained of racist bathroom
- 16                 graffiti. (*See* Exhibit 10, at 168:11-15 & 169:7-11, 20-25; and *see* Exhibit 9, at
- 17                 APP035.)
- 18          21.     The Sphere project was only shut down for one week. (*See* Exhibit 12, at 32:25 to
- 19                 33:10 & 37:7-18.)
- 20          22.     During the shutdown, some work continued. (*See* Exhibit 12, at 33:2-10.)
- 21          23.     MJ Dean replaced Colvin. (*See* Exhibit 10, at 186:3-7 & 188:4-6.)

### 22   **III.   LEGAL ARGUMENT**

23         Summary judgment is appropriate when, viewing the facts in the light most favorable to

24   the nonmoving party, there is no genuine issue of material fact that would preclude summary

25   judgment as a matter of law. *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir.1996); Fed.R.Civ.P.

26   56(c). The materiality of a fact is based upon the substantive law of the underlying claim.

27   *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505 (1986).

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1 The moving party bears the burden of proving there is no genuine issue of material fact,  
 2 through the use of authenticated evidence, to show that they are entitled to judgment as a matter  
 3 of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *See Orr v. Bank of America*, 285 F.3d  
 4 764 (9th Cir.2002). The burden then shifts to the nonmoving party, to survive summary  
 5 judgment, to establish that there are specific material facts in dispute through use of authenticated  
 6 evidence. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986); *see Orr*,  
 7 285 F.3d at 773.

8 Here, MJ Dean has failed to provide this Court with any specific material facts to survive  
 9 summary judgment on liability. Because there are no material facts in dispute regarding Colvin's  
 10 claims of (1) Negligent Training and Supervision and (2) Retaliation in violation of Title VII,  
 11 this Court should enter liability against MJ Dean.

12 **A. It is undisputed that MJ Dean does not enforce its anti-discrimination and**  
 13 **harassment policies or take any action to prevent future discrimination after**  
 14 **complaints are made.**

15 An "employer has a duty to use reasonable care in the training, supervision, and retention  
 16 of his or her employees to make sure that the employees are fit for their positions." *Hall v. SSF,*  
 17 *Inc.*, 112 Nev. 1384, 1393, 930 P.2d 94, 99 (Nev. 1996). "The tort of negligent training and  
 18 supervision imposes direct liability on the employer if (1) the employer knew that the employee  
 19 acted in a negligent manner, (2) the employer failed to train or supervise the employee  
 20 adequately, and (3) the employer's negligence proximately caused the plaintiff's injuries." *Id.*

21 If racially hostile conduct "pollutes the victim's workplace, making it more difficult for  
 22 [him] to do [his] job, to take pride in [his] work, and to desire to stay on in [his] position," then a  
 23 hostile work environment exists. *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1113 (9th Cir.  
 24 2004). Title VII's prohibition of race discrimination and harassment guarantees employees "the  
 25 right to work in an environment free from discriminatory intimidation, ridicule, and insult." *Id.* at  
 26 1112 (9th Cir. 2004) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65, 106 S.Ct. 2399  
 27 (1986)).

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1 “Employers are liable for failing to remedy or prevent a hostile or offensive work  
2 environment of which management-level employees knew, or in the exercise of reasonable care  
3 should have known.” *McGinest*, 360 F.3d at 1119. To avoid liability, the employer must take  
4 “remedial measures reasonably calculated to end the harassment.” *Id.* at 1120 (internal quotations  
5 omitted). “Inaction constitutes a ratification of past harassment, even if such harassment  
6 independently ceases.” *Id.* “[R]emedial actions must be designed not only to prevent future  
7 conduct by the harasser, but also by other potential harassers.” *Id.* at 1121.

8 Here, MJ Dean knows that it acted in a negligent manner regarding the training and  
9 supervision of its management for its failure to enforce its anti-discrimination and harassment  
10 policies. MJ Dean argues that all complaints regarding race discrimination and harassment must  
11 be in writing, but MJ Dean’s policy for reporting discrimination or harassment does not require  
12 the report be in writing. (See Exhibit 4, at APP015; and see Exhibit 5, at APP019.) The only  
13 requirement is a report to a supervisor. (See Exhibit 4, at APP015; and see Exhibit 5, at  
14 APP019.) The .)

15 Racism at the Sphere project is an ongoing issue. (See Exhibit 11, at 33:15-18.) Racist  
16 graffiti has appeared in the bathrooms at the Sphere project 200 different times. (See Exhibit 11,  
17 at 33:8-18.) Gutierrez reported the 200 instances of racist bathroom graffiti he saw at work to  
18 Safety. (See Exhibit 11, at 31:22 to 32:1.) Neither Tony nor Julian from Safety reported the  
19 numerous instances of racist bathroom graffiti to Rosequist. (See Exhibit 13, at 15:10-15, 16:10  
20 to 17:3, & 20:10-13.)

21 Gutierrez was initially Colvin’s supervisor. (See Exhibit 3; and see Exhibit 10, at 89:2-4.)  
22 Gutierrez is MJ Dean’s General Foreman. (See Exhibit 11, at 7:1-3.) Gutierrez never reported the  
23 white supremacist comments he heard at work. (See Exhibit 11, at 40:21-25, 41:8-10, & 41:19 to  
24 42:2.) Gutierrez admits he is supposed to report racial slurs and racist graffiti to Rosequist in  
25 Safety. (See Exhibit 11, at 22:15-25, 23:11-17, & 42:11-16.) As General Foreman and a  
26 supervisor, Gutierrez was required to ensure that the anti-discrimination and harassment policies  
27 were followed. Gutierrez admits he did not follow these policies with respect to the white

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1 supremacist comments he heard on the job site. (See Exhibit 11, at 40:21-25, 41:8-10, & 41:19  
2 to 42:2.) By not reporting all comments he heard, he condoned racial discrimination and  
3 harassment in the workplace.

4 Thomason was the concrete superintendent on site and has been the Director of Field  
5 Operations for MJ Dean for the past four years. (See Exhibit 12, at 5:14-16 & 15:21-23.) He was  
6 the top MJ Dean executive on the project, owning a 4% share in MJ Dean. (See Exhibit 12, at  
7 8:5-10 & 16:14-20.) Thomason has worked in management for MJ Dean for the past 25 years.  
8 (See Exhibit 12, at 5:24 to 6:9.) Thomason chose Gutierrez as General Foreman for the project,  
9 overseeing concrete (See Exhibit 11, at 7:1-3.)

10 Thomason never conducted meetings or trainings regarding MJ Dean's anti-  
11 discrimination and harassment policies. (See Exhibit 12, at 25:9-17.) Thomason also does not  
12 know whether any meetings or trainings occurred following Colvin's complaints regarding the  
13 racially hostile work environment. (See Exhibit 12, at 25:18-21.) These meetings and trainings  
14 should have occurred following Colvin's complaints because that is the only way to remedy and  
15 prevent future racial discrimination and harassment. As a 4% owner of the company, and the face  
16 of ownership at the job site, Thomason was required to ensure that these meetings and trainings  
17 occurred following Colvin's complaints. By not ensuring these meetings and trainings, he  
18 condoned racial discrimination and harassment in the MJ Dean workplace.

19 Rosequist was the Project Safety Manager at the Sphere job site. (See Exhibit 13, at 8:11-  
20 21.) Rosequist never conducted meetings or trainings regarding MJ Dean's anti-discrimination  
21 and harassment policies. (See Exhibit 13, at 18:12-16 & 19:5-18.) While Rosequist decides what  
22 information is discussed at weekly safety meetings, he does not know if he had the anti-  
23 discrimination and harassment policies discussed. (See Exhibit 13, at 18:12-16 & 19:5-18.)  
24 Rosequist does not attend weekly safety meetings. (See Exhibit 13, at 18:12-16.) MJ Dean did  
25 not discuss the anti-discrimination and harassment policies at the weekly safety meetings  
26 following Colvin's complaints. (See Exhibit 12, at 25:18-21; and see Exhibit 13, at 19:5-18.)  
27 Rosequist never submitted Colvin's complaint regarding Gutierrez calling him a "nigger" to

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1 Human Resources. (See Exhibit 13, at 17:23-25.) By not submitting Colvin's "nigger" complaint  
2 to Human Resources and ensuring that trainings and meetings were held after Colvin's  
3 complaint, Rosequist condoned the use of racial slurs in the workplace.

4       Regarding the racist bathroom graffiti, MJ Dean still does not understand its obligations  
5 under Title VII to remedy and prevent future racist bathroom graffiti. Removal is not enough! MJ  
6 Dean should have conducted over 200 investigations regarding the racist bathroom graffiti. Julian  
7 and Tony from Safety should have reported these 200 instances from Gutierrez, and Colvin's two  
8 instances, to Rosequist to conduct investigations. Such investigations could have helped  
9 determine who was responsible for such graffiti, including interviewing all employees in the  
10 areas where such graffiti was present. MJ Dean conducted zero investigations regarding the racist  
11 bathroom graffiti. By not conducting any investigations, in violation of its own anti-  
12 discrimination and harassment policies, MJ Dean effectively condoned and authorized future  
13 instances of racist bathroom graffiti. MJ Dean was also required to then take the next step of  
14 conducting meetings and trainings with all of its staff to prevent future instances of racist  
15 bathroom graffiti.

16       It is undisputed that MJ Dean directed its employees to report instances of racism to  
17 Safety, based on both Gutierrez and Colvin's reports and Rosequist's response to Colvin's  
18 "nigger" report. MJ Dean failed to take any future actions, beyond removal of the graffiti,  
19 because it condones racism in the workplace. MJ Dean's anti-discrimination and harassment  
20 policies show MJ Dean knows better.

21       MJ Dean attempts to argue that Colvin does not know what training MJ Dean provides to  
22 its managers, but that is not the issue. MJ Dean has a clear anti-discrimination and harassment  
23 policy that was not enforced. The management, including 4% owner Thomason and Safety  
24 Manager Rosequist, both admit they did not direct any meetings or trainings to occur after  
25 Colvin's "nigger" report. That admission shows they did not take the racism issue seriously. On  
26 top of that, MJ Dean failed to take the racist bathroom graffiti issue seriously. While removal of  
27 the graffiti is important, it is more important to take steps to ensure it will not happen again,  
28 including investigations, meetings, and trainings.

1 As a result, Colvin was injured by MJ Dean's failure to enforce its anti-discrimination  
2 and harassment policies. If MJ Dean had properly enforced those policies, then Colvin would not  
3 have been subjected to a racially hostile work environment.

4 Because MJ Dean chose to not take any steps to remedy or prevent future racial  
5 discrimination and harassment toward African-Americans, it condoned racial discrimination and  
6 harassment in its workplace.

7 **B. MJ Dean retaliated against Colvin by directing his harasser to terminate his**  
8 **employment.**

9 An employer may not retaliate against an employee because that employee has opposed  
10 an unlawful employment practice. 42 U.S.C. § 2000e-3(a). To establish a *prima facie* case of  
11 retaliation under Title VII, the plaintiff must show that he "engaged in a protected activity, [was]  
12 subsequently subjected to an adverse employment action, and that a causal link exists between  
13 the two." *Dawson v. Entek Int'l.*, 630 F.3d 928, 936 (9<sup>th</sup> Cir. 2011).

14 Here, Colvin was terminated by Gutierrez (Colvin's harasser). (*See* Exhibit 9; *see* Exhibit  
15 10, at 182:23-25; and *see* Exhibit 11, at 44:5-10 & 182:25 to 183:3.) MJ Dean does not  
16 acknowledge this fact in its opposition of its motion for summary judgment. MJ Dean ignores  
17 that Gutierrez signed Colvin's termination notice. (*See* Exhibit 9.) MJ Dean provides no  
18 explanation why Gutierrez terminated Colvin's employment when Muti was Colvin's supervisor  
19 at the time. The termination policy requires the employee's supervisor to make the notifications  
20 regarding termination. (*See* Exhibit 4, at APP013.) In fact, MJ Dean argues Colvin had no  
21 interaction with Gutierrez after the "nigger" comment. (*See* Doc. 48, at 7:27.) This statement is  
22 blatantly false. It is undisputed that Gutierrez is the individual that notified Colvin of his  
23 termination and signed the termination notice. (*See* Exhibit 9; and *see* Exhibit 11, at 44:5-10 &  
24 182:25 to 183:3.)

25 MJ Dean's failure to provide any training or meetings to remedy and prevent future racial  
26 discrimination and harassment, coupled with its direction for Gutierrez to terminate Colvin  
27 shows MJ Dean's retaliatory motive. MJ Dean refused to take any steps to prevent future racial

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1 discrimination and harassment and used Gutierrez (Colvin's harasser) to terminate his  
2 employment. These actions show MJ Dean encourages racial discrimination and harassment  
3 toward African-American individuals.

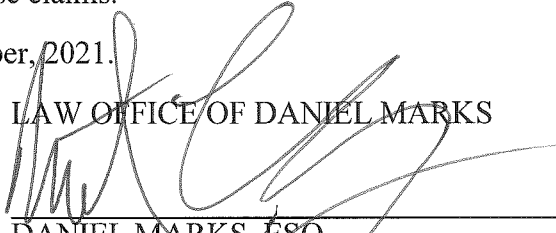
4 Because MJ Dean had Gutierrez (Colvin's harasser) terminate Colvin, instead of his  
5 supervisor (Muti), this Court may grant Colvin summary judgment on liability on his Retaliation  
6 cause of action because there are no material facts in dispute.

7 **IV. CONCLUSION**

8 MJ Dean has failed to provide this Court with any specific material facts to prevent  
9 judgment, as a matter of law, on liability for the claims of (1) Negligent Training and Supervision  
10 and (2) Retaliation in violation of Title VII. Because there are no material facts in dispute, this  
11 Court should grant Colvin liability as to those claims.

12 DATED this 10th day of November, 2021.

13 LAW OFFICE OF DANIEL MARKS

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**CERTIFICATE OF SERVICE**

I hereby certify that I am an employee of the LAW OFFICE OF DANIEL MARKS, and that on the 10th day of November, 2021, I did serve a true and correct copy of the above and foregoing **PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY** by way of Notice of Electronic Filing provided by the court mandated ECF filing service, upon the Defendant at the following:

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